No. 05-8794

IN THE

Supreme Court of the United States

CLARENCE E. HILL,

Petitioner,

v.

JAMES R. MCDONOUGH, SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS, ET AL.

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICUS CURIAE* HABEAS CORPUS RESOURCE CENTER IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* HABEAS CORPUS RESOURCE CENTER IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*

The Habeas Corpus Resource Center is an agency of the Judicial Branch of the State of California. HCRC provides legal representation for indigent petitioners in death penalty habeas corpus proceedings before the California Supreme Court and the federal courts, assists the California Supreme Court by identifying and recruiting private counsel qualified to accept appointments in death penalty habeas corpus proceedings, and provides training and serves as a resource to these attorneys. *See* Cal. Gov't Code § 68661 (West 2006). The HCRC is representing or has represented death row

prisoners in over fifty state and federal habeas corpus proceedings.

The HCRC has an interest in the resolution of this case both in its capacity as counsel to death row inmates and because of its larger responsibility for supporting private counsel. In the second of those roles, HCRC already has been involved in litigation challenging the constitutionality of the method used by the State of California to carry out executions.

The HCRC, therefore, has a particular interest in ensuring that the adjudication of claims relating to the constitutionality of particular methods of execution which may involve "the unnecessary and wanton infliction of pain," *Gregg v. Georgia*, 428 U.S. 153, 173 (1976) (lead plurality opinion), are made upon adequately developed, fully informed factual records. It respectfully submits this *Amicus Curiae* brief to explain the importance of permitting factual development of particularized challenges to methods of lethal injection, as illustrated by recent litigation in California, most notably in the case of *Morales v. Hickman*.

This brief is filed with the written consent of all parties pursuant to this Court's Rule 37.3(a). Copies of the requisite consent letters have been filed with the Clerk.[1]

STATEMENT OF THE CASE

On January 20, 2006, Mr. Hill, a Florida death row prisoner facing execution by lethal injection, brought an action in federal district court, under 42 U.S.C. section 1983, challenging the State's lethal injection protocol as violative

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[1] Pursuant to this Court's Rule 37.6, we certify that no part of this brief was authored by counsel for any party and no person or entity other than the Habeas Corpus Resource Center made any monetary contribution to the preparation or submission of the brief.

of the Eighth and Fourteenth Amendments to the Constitution. Mr. Hill alleged, in summary, that the particular succession and amounts of three chemicals used in the Florida protocol "will cause unnecessary pain in the execution of . . . [his] sentence of death." Complaint, ¶18. Without permitting any factual development or examining the merits of the claims, the district court denied Mr. Hill's complaint for lack of jurisdiction, stating that it was the "functional equivalent" of a successive habeas petition under 28 U.S.C. section 2244 and that Mr. Hill should have first sought permission from the Eleventh Circuit to file such a petition. *Hill v. Crosby*, ___ F. Supp. ___, 2006 WL 167585 at *2 (N.D. Fla. Jan. 21, 2006).

On January 23, 2006, Mr. Hill appealed the district court's decision to the United States Court of Appeals for the Eleventh Circuit. The circuit court affirmed, agreeing with the district court that Mr. Hill's section 1983 action was the "functional equivalent" of a successive habeas petition and holding that 28 U.S.C. section 2244 does not permit challenges to a lethal injection protocol to be brought in a successive habeas corpus petition. *Hill v. Crosby*, __ F.3rd ___, 2006 WL 163607 (11th Cir. Jan. 24, 2006).

On January 25, 2006, this Court granted Mr. Hill's petition for certiorari. *Hill v. Crosby*, ___ U.S. ___, 126 S. Ct. 1189 (2006). The petition presents the following two questions:

> 1. Whether a complaint brought under 42 U.S.C. § 1983 by a death-sentenced state prisoner, who seeks to stay his execution in order to pursue a challenge to the chemicals utilized for carrying out the execution, is properly recharacterized as a habeas corpus petition under 28 U.S.C. § 2254?
>
> 2. Whether, under this Court's decision in *Nelson*, a challenge to a particular protocol the State plans to

use during the execution process constitutes a cognizable claim under 42 U.S.C. § 1983?

SUMMARY OF ARGUMENT

Mr. Hill's case presents the question of whether the Eleventh Circuit correctly dismissed his complaint challenging Florida's protocol for lethal injection without permitting any factual development bearing on the merits of the claim he pleaded. *Amicus Curiae* urges this Court, particularly in addressing Question 2 of the questions presented for review, to allow Mr. Hill to develop his claim in a manner that accommodates the need for discovery and the making of an adequate factual record in order to support informed Eighth Amendment adjudication of a challenge to a particular lethal injection protocol.

In this regard, the California case of *Morales v. Hickman*, currently pending in the United States District Court for the Northern District of California, is instructive. There, the district court concluded that it properly had jurisdiction to review whether there was an unconstitutional likelihood that Mr. Morales would experience unnecessary and excruciating pain if executed under the California procedures.[2] The district court further determined that, because the State of California solely possessed information critical to resolving Mr. Morales' claim, limited discovery was warranted prior to

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[2] Although there are some differences between the lethal injection protocols of California and Florida, both utilize a mechanical apparatus (rather than a syringe) to inject three drugs to perform the execution. The three drugs are sodium thiopental, a sedative; pancuronium bromide, a neuromuscular blocking agent; and potassium chloride, which is used to induce cardiac arrest. The crux of Mr. Morales' challenge to the California procedure is that some component or the interaction of components of the protocol will result in his not being sufficiently anesthetized by the first chemical when the second and third chemicals are injected.

summary adjudication of the matter. Based on the information discovered, the district court concluded that Mr. Morales has demonstrated "substantial questions" that he would suffer excessive pain if executed under the existing procedures. With the State's input and modification of its execution protocol, the district court then fashioned a limited remedy that, if followed, would have permitted Mr. Morales' execution. The State ultimately was unable to implement its modified protocol or otherwise minimize the unconstitutional risk of an excruciating execution.

As the *Morales* case demonstrates, challenges to lethal injection protocols are extremely complex, fact-intensive litigations that require adequate factual development before a proper determination can be made as to whether a particular protocol passes constitutional muster. *Amicus Curiae* therefore urges this Court to allow Mr. Hill to pursue his challenge to Florida's lethal injection protocol in the lower federal courts so that he may develop a proper record regarding the specifics of the protocol comparable to the record that has been developed, and will be further developed, in *Morales*. *Amicus Curiae* suggests this course because the quality of the record is of paramount importance for informed adjudication of a constitutional question like the one presented in *Hill*. In testing lethal injection procedures against the cruel and unusual punishments guarantee of the Eighth Amendment, the federal courts "must review independently both the legal issues and those factual matters with which they are commingled." *Oyama v. California*, 332 U.S. 633, 636 (1948); *see also* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 608 (1991) ("fact and law in constitutional analysis are bound together").

ARGUMENT

I.

A FULL FACTUAL RECORD MUST BE DEVELOPED BEFORE A COURT MAY PROPERLY REVIEW A CONSTITUTIONAL CHALLENGE TO A STATE'S LETHAL INJECTION PROCEDURES.

The factual development resulting from the recent litigation in *Morales v. Hickman* provides a strong example of why this Court should afford Mr. Hill the opportunity to discover and present evidence challenging Florida's lethal injection procedures. Mr. Morales has developed a record showing that the use of California's existing execution protocol created an undue likelihood that he would suffer intense pain if executed by lethal injection. Mr. Morales' argument was twofold: First, due to the failure to properly sedate the prisoner,[3] there was a substantial probability that he would be conscious and experience excruciating and unnecessary pain when the remaining two drugs were administered.[4] Second, there were recurrent, serious problems with the personnel and apparatus used to administer lethal injections.[5] Although there are some differences between California's lethal injection procedure and Florida's protocol,[6] both states use the same three chemicals during executions and similar methods of delivering the chemicals.

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[3] *See* Part II, at pages 12-16, *infra*.

[4] As the Ninth Circuit noted: "There is no dispute that in the absence of a properly administered anesthetic, Morales would experience the sensation of suffocation as a result of the pancuronium bromide and excruciating pain from the potassium chloride activating nerve endings in Morales' veins." *Morales v. Hickman*, 2006 WL 391604 at *2.

[5] *See* Parts III and IV at pages 16-19, *infra*.

[6] *See Sims v. Florida*, 754 So.2d 657, 666 n.17 (Fla. 2000).

On January 13, 2006, Mr. Morales brought an action in the district court pursuant to 42 U.S.C. section 1983 seeking injunctive relief to prevent the State of California from executing him by means of lethal injection pending the resolution of his action. Mr. Morales alleged that the State's administration of Procedure No. 770,[7] the lethal injection protocol of California's Department of Corrections and Rehabilitation, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments because it created a substantial likelihood that he would be conscious and in agonizing pain for the duration of the execution process. Mr. Morales specifically alleged that the use of pancuronium bromide and potassium chloride in executing him would cause him to suffer excruciating pain because he would not be properly sedated. Mr. Morales also alleged that California's apparatus for delivering the chemicals was severely flawed and created the danger that a proper dosage of the sedative sodium thiopental would not be delivered.[8] In addition, Mr. Morales alleged that San Quentin's staff was not properly trained to insert intravenous tubes, which increases the risk of inadequate delivery of the sedative.

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[7] Although the State has not made clear how Procedure 770 was developed, it has conceded that no medical personnel were involved in its development and that there has been no medical approval of the procedure.

[8] California's Procedure 770 requires multiple sets of intravenous tubing and extensions because the chemicals are administered to the prisoner from a separate room located behind the gurney on which the prisoner is strapped. It is estimated that approximately fifty feet of intravenous tubing is used to deliver the toxic chemicals to the prisoner. These tubes are connected with various "diaphragms" or adapters. The risk of the chemicals not being properly delivered to the prisoner is greatly increased by the use of such lengthy amounts of tubing, because the tubing can crimp, preventing the chemicals from reaching the prisoner, and the multiple connections increase the risk of leakage.

On the same date, Mr. Morales also filed a motion for discovery, requesting numerous documents. The district court later granted a portion of his request and provided Mr. Morales with the execution logs and handwritten notes of the three most recent California executions,[9] an unredacted version of Procedure 770, and all existing electrocardiograms ("EKGs") of executed prisoners.

Mr. Morales filed a Motion for a Temporary Restraining Order on January 17, 2006, which the district court construed as a motion for a preliminary injunction. The district court held the first hearing on Mr. Morales' motion on January 26, 2006. The main focus of the hearing was to discuss the three most recent executions, as well as whether the use of pancuronium bromide was necessary in the execution protocol given that it would prevent any observer from detecting whether the prisoner was properly sedated. The court ordered additional briefing regarding the three most recent executions, with a timetable that, while expeditious, would allow Mr. Morales' expert to review the recently obtained execution logs and handwritten notes.

At the subsequent hearing, held on February 9, 2006, the district court noted that there were significant problems with the three most recent executions. It was specifically concerned that, in the cases of Stanley "Tookie" Williams and Clarence Ray Allen, the prisoners may not have been properly sedated.[10] The district court also noted that their

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[9] The three most recent executions that California had conducted were those of Donald Beardslee on January 19, 2005; Stanley "Tookie" Williams on December 13, 2005; and Clarence Ray Allen on January 17, 2006.

[10] The district court's findings at this hearing were premised upon the discovery afforded to Mr. Morales, three declarations from Dr. Mark Heath, a Professor of Clinical Anesthesiology at Columbia University Medical Center, and numerous eyewitness accounts of the previous executions. As described more fully

breathing persisted for much longer than the time the State's expert suggested would be expected.[11] In addition, the district court determined that the EKGs provided by the State and used to monitor the prisoners' breathing were scientifically invalid in that they did not indicate the rate of breathing or the time between breaths. The district court found a third declaration provided by Dr. Mark Heath, Mr. Morales's anesthesiology expert, particularly persuasive, and, as a result, requested additional supplemental briefing to address the feasibility of proceeding with Mr. Morales' execution either using only sodium thiopental or utilizing an independent means to ensure that he would be unconscious before pancuronium bromide and potassium chloride were injected.[12]

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below, the recent executions demonstrate that the State continued to experience difficulties administering executions after the same district court had rejected a challenge to lethal injection the previous year. In particular, the execution logs and handwritten notes taken by prison officials during the executions of Mr. Williams and Mr. Allen demonstrate a significant likelihood that both of these prisoners experienced excruciating pain during their executions.

[11] The State's expert opined that a properly sedated prisoner receiving five grams of sodium thiopental would stop breathing within one minute.

[12] The State responded to the district court's order by arguing that it would be "feasible" to execute Mr. Morales by using sodium thiopental alone, but that it might unnecessarily delay the execution as it could take up to forty-five minutes to produce death. The State argued that prior executions had taken 11.3 minutes, on average, to complete. As to the second option, the State responded that it would have the Warden stand in the chamber to assess whether the prisoner was unconscious, rejecting the court's suggestion that persons other than those employed by the Department of Corrections be present in the chamber with the prisoner.

On February 14, 2006, the district court issued an order addressing "the narrow question of whether the evidence before the Court demonstrates that Defendants' administration of California's lethal-injection protocol creates an undue risk that Plaintiff will suffer excessive pain when he is executed." *Morales v. Hickman*, ___F. Supp. 2d ___, 2006 WL 335427 at * 6 (N.D. Cal. Feb. 14, 2006). The court found that Mr. Morales had "raised substantial questions in this regard." *Id.* Specifically, it noted that

> evidence from Defendants' own execution logs that the inmates' breathing may not have ceased as expected in at least six out of thirteen executions by lethal injection in California raises at least some doubt as to whether the protocol actually is functioning as intended, and because of the paralytic effect of pancuronium bromide, evidence that an inmate was conscious at some point after that drug was injected would be imperceptible to anyone other than a person with training and experience in anesthesia.

Id. at *6. The district court went on to hold that California's Procedure 770 had to be altered to ensure that Mr. Morales would not be conscious during his execution. It gave the State two options: either employ two anesthesiologists to monitor consciousness, or use only the prescribed five grams of sodium thiopental and eliminate the other two drugs from the execution. The district court, however, refused to stay Mr. Morales' execution date of February 21, 2006.

The State chose the option of having two anesthesiologists present during the execution. On February 16, 2006, the district court issued a compliance order detailing the procedure to be followed, most notably ordering that the anesthesiologists "take all medically necessary steps to ensure that [Mr. Morales] is and remains unconscious."

Mr. Morales appealed to the United States Court of Appeals for the Ninth Circuit, which affirmed the judgment below. *Morales v. Hickman*, ___ F.3d ___, 2006 WL 391604 (9th Cir. Feb. 19, 2006). The court agreed with the district court that there were troubling questions raised by the record, but it concluded that the lower court's remedy would alleviate the risk of unnecessary pain.

As the execution date approached, however, the anesthesiologists retained by the State learned – apparently belatedly – what they would be expected to do during the procedure, and they refused to participate.[13] On the eve of the execution, the State changed course and decided that it would execute Mr. Morales by the use of sodium thiopental alone. The district court, at a hearing held on February 21, 2006, expressed concern and some skepticism as to how the State could have misinterpreted the court's prior order requiring the anesthesiologists to both monitor unconsciousness and "take all medically necessary steps" to ensure that Mr. Morales would remain unconscious during the administration of all three chemicals. As a result, the district court subsequently entered a very specific compliance order requiring that the personnel administering the sodium thiopental be licensed and properly trained, and directly inject the sedative into Mr. Morales instead of using the extended lengths of tubing called for in Procedure 770. The State declined to conduct the execution under these conditions, stating that it did not want to have any individual present in the execution chamber during the execution. As a result, the execution did not take place before the execution warrant expired. Subsequently, the district court ordered an evidentiary hearing to begin on May 2, 2006.

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[13] Stacy Finz, Bob Egelko, & Kevin Fagan, *Killer's execution rescheduled, delay comes before doctors walk out; new lethal injection set for 7:30 p.m.*, S.F. CHRON., Feb. 21, 2006, at http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/02/21/MNG14HC1HG16.DTL&hw=finz&sn=004&sc=958

II.

FACTUAL DEVELOPMENT WAS CRITICAL TO MR. MORALES' DEMONSTRATION THAT PREVIOUSLY EXECUTED PRISONERS WERE NOT PROPERLY SEDATED BEFORE THEIR EXECUTIONS.

Mr. Morales was enabled to present the district court with evidence that Procedure 770 created an undue likelihood of pain only through a careful development of the record, including limited but significant discovery ordered by the court and provided by the State. Execution logs kept by San Quentin State Prison for prior executions and obtained by Mr. Morales, partly through this court-ordered discovery, were particularly revealing in demonstrating problems with prior executions, and were heavily relied upon by the district court. They provided a basis for Mr. Morales' expert consultant, Dr. Mark Heath, an anesthesiologist familiar with lethal injection protocols throughout the country, to evaluate the actual operation of the California protocol and advise the court about it in a series of four progressively informed declarations.

Consequently, the district court concluded that, at a minimum, six of California's thirteen executions by lethal injection had significant problems related to the risk of improper anesthesia administration. Procedure 770 specifies the use of five grams of sodium thiopental for the stated purpose of anesthesia. Both the State and Mr. Morales agreed that this amount of sodium thiopental, if properly administered, would be sufficient not only to render the prisoner unconscious, but to stop his breathing within one minute and result in death within a few minutes. However, the record developed to date shows that prisoners executed under the protocol have not reacted to the sodium thiopental in this expected fashion.

For example, witness accounts of the execution of Stephen Wayne Anderson suggest that he was not properly

anesthetized when he died. The January 29, 2002 execution log for Mr. Anderson's execution, which the State recently produced to Mr. Morales in discovery, reveals that Mr. Anderson continued breathing until five minutes after the thiopental was administered. This persistent respiratory activity is not consistent with the expected effect of five grams of thiopental, which should stop all visible respiratory activity within a minute of its delivery. In addition, the execution took over thirty minutes, and during that time Mr. Anderson's chest and stomach heaved more than thirty times. Irregular heaving of the chest is not consistent with the depression of the central nervous system caused by sodium pentothal.[14] Rather, chest heaving is indicative of labored respiratory activity, which in turn strongly suggests that Mr. Anderson was conscious, and indeed may have been laboring against the paralyzing effect of the pancuronium bromide.

The execution log of Manuel Babbit's 1999 execution also indicates that he was not fully sedated during the process. A minute after the pancuronium bromide was administered, Mr. Babbit had shallow respirations and brief spasms in his upper abdomen, which is evidence that he was reacting to the effects of the pancuronium bromide. In addition, Mr. Babbit's heart rate remained constant until the potassium chloride was administered; whereas, if the full dose of sodium pentothal had been properly administered and distributed, Mr. Babbit's heart rate would have changed significantly. His distress was evident to witnesses of the execution, one of whom stated that about three or four minutes after Mr. Babbit closed his eyes and took a couple of deep breaths, he had a sudden and extreme convulsion which lasted a few seconds. This witness opined that Mr. Babbit appeared about to break all the restraints when this occurred.

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[14] According to Dr. Heath, the typical reaction to sodium pentothal is yawning, drawing one or two deep breaths, or visibly exhaling so that the cheeks puff out.

Furthermore, a review of Mr. Babbit's execution log shows that he maintained a steady heart rate of between 95 and 96 beats per minute a full seven minutes after the sodium thiopental was administered. If the full five-gram dose of sodium thiopental was properly administered, there would have been significant hemodynamic consequences, including a change of heart rate, during this time period. The log also indicates that Mr. Babbit had spasmodic movements of the upper chest after the pancuronium bromide was administered, similar to what was noted during the Stephen Anderson execution – again raising the concern that Mr. Babbit did not receive the full five grams of sodium thiopental and thus was conscious during the administration of the pancuronium bromide.

The execution logs of William Bonin's 1996 execution also reflect irregularities that may have caused him to die in excruciating pain. Mr. Bonin was given a second dose of pancuronium bromide for reasons that remain unclear, even though the initial dose would paralyze a person for several hours. The redundant dose raises questions about whether Bonin received the initial doses of sodium pentothal and pancuronium bromide; whether the injection team believed that he was still conscious; and, more broadly, whether such an irregularity is indicative of the lack of training or judgment of injection personnel. These accounts of earlier California executions, according to the Ninth Circuit, were "extremely troubling," because they indicate "that there were problems associated with the administration of the chemicals that may have resulted in the prisoners being conscious during portions of the executions." *Beardslee v. Woodford*, 395 F.3d 1064, 1075 (9th Cir. 2005).

Evidence developed in the *Morales* litigation relating to more recent executions buttresses this conclusion. The handwritten records of Stanley "Tookie" Williams' execution suggest that the entire dose of sodium thiopental may not have reached Mr. Williams, though none of this information

was recorded in his execution log. The State was not able to explain why the execution log did not contain the information present in the handwritten notes which were taken during the execution. The notes indicate that Mr. Williams did not stop breathing until 12:34 a.m., upon the injection of the potassium chloride, twelve minutes after the thiopental was injected. Thus, the thiopental did not have the effect on Mr. Williams' brain and respiratory activity that would be expected, with a high degree of medical certainty, from the delivery into the circulatory system of the full five-gram dose of thiopental.

The execution log of Clarence Ray Allen states that he continued breathing for nine minutes after the delivery of the thiopental. All evidence demonstrates that five grams of thiopental, if successfully delivered into the circulatory system, would ablate cerebral electrical and respiratory activity.

The March 15, 2000 execution log of Darrell Keith Rich states that Mr. Rich's respirations ceased at 12:08 a.m., with the administration of the pancuronium, but that Mr. Rich had "chest movements" lasting from 12:09 to 12:10 a.m.. These chest movements, beginning after Mr. Rich had ostensibly stopped breathing (and while he was still alive, as shown by his heart rate of 110 beats per minute), and three minutes after the administration of the thiopental, are again inconsistent with proper administration of the thiopental. The chest movements are consistent, however, with an attempt to fight against the accruing paralytic effect of the pancuronium. According to Dr. Heath, if the five-gram dose of thiopental had reached Mr. Rich and had the expected effect, he would not have been able to fight against the pancuronium by attempting to breathe, nor would he even have been aware of the effect of the pancuronium. Indeed, because the sodium thiopental dose, successfully delivered, would have arrested all cerebral activity, including all respiratory drive, there should have been no effort on Mr.

Rich's part to attempt to breathe during the onset of the pancuronium.

III.

FACTUAL DEVELOPMENT WAS CRITICAL TO MR. MORALES' DEMONSTRATION THAT PERSONNEL AT SAN QUENTIN ARE NOT PROPERLY TRAINED TO INSERT INTRAVENOUS LINES.

There has also been a demonstrated problem of incorrect intravenous placement in at least three California executions. Most recently, during the execution of Stanley "Tookie" Williams, the injection team took twelve minutes to insert the intravenous lines. The first line was placed quickly but spurted blood, and the staff struggled for eleven minutes to insert the second line, having so much difficulty that Williams asked whether they were "doing that right." Kevin Fagan, *The Execution Of Stanley Tookie Williams Eyewitness: Prisoner Did Not Die Meekly, Quietly*, S.F. CHRON., Dec. 14, 2005, at A12. The difficulty of the challenge presented to the intravenous team is evidenced by the comment that "[b]y 12:10 a.m., the medical tech's lips were tight and white and sweat was pooling on her forehead as she probed Williams' arm." *Id.* Moreover, the execution log of Williams' execution shows that one of the intravenous lines failed.

Similarly, the execution log of Donald Beardslee's execution indicates that the second intravenous line was inserted with "difficulty," and the time entries indicate that it took twelve minutes to insert the second line, which is consistent with encountering problems in inserting the line. When it proceeds smoothly, placement of a peripheral intravenous should, in Dr. Heath's experience, take on the order of two minutes or less. In the execution of William Bonin, it took the staff assigned anywhere between eighteen and twenty-seven minutes to fashion the intravenous lines.

This is an unusually long period of time for an experienced and properly trained professional.

In the execution of Stephen Anderson on January 29, 2002, one of the persons who attempted to secure an intravenous was unable to do so without causing significant bleeding and the need to remove his gloves. This experience indicates that the process is a difficult one and that it is necessary that those doing it are properly trained and experienced.

IV.

FACTUAL DEVELOPMENT WAS CRITICAL TO MR. MORALES' DEMONSTRATION THAT THE EXECUTION TEAM DEVIATED FROM PROTOCOL BY ADMINISTERING MULTIPLE DOSES OF CHEMICALS AND THAT THESE IRREGULARITIES WERE NOT REPORTED IN EXECUTION RECORDS.

The administration of a second dose of pancuronium (the neuromuscular blocking agent), as indicated in the log of Mr. Bonin's execution on February 23, 1996, was a source of concern to the district court hearing Mr. Morales' case. The court also was concerned when it learned that a second dose of potassium chloride (which burns through the veins to the heart, where it produces intense muscle cramping and eventually cardiac arrest), was administered to three prisoners, including Clarence Ray Allen.[15]

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[15] A declaration provided by Dr. Jack St. Clair of San Quentin State Prison indicates that a second dose of potassium chloride was injected into Mr. Allen, resulting in a flat line and pronouncement of death. The execution logs provided to Mr. Morales in discovery, however, made no mention of a second dose of potassium chloride in Mr. Allen's case or in any other execution. (The district court noted that execution logs had been altered by the State without any indication as to who made the alteration. *Morales v. Hickman*, ___ F. Supp. 2d ___, 2006 WL 335427 at *5

These irregularities led the district court to observe that

> evidence in the present record raises additional concerns as to the manner in which the drugs used in the lethal-injection protocol are administered. For example, it is unclear why some inmates—including Clarence Ray Allen, who had a long history of coronary artery disease and suffered a heart attack less than five months before he was executed, . . . — have required second doses of potassium chloride to stop promptly the beating of their hearts.

Morales v. Hickman, ___F. Supp. 2d ___, 2006 WL 335427 at *6 (N.D. Cal. Feb. 14, 2006).

CONCLUSION

The record developed in the *Morales* case was sufficient to enable the district court to determine that California's execution protocol was riddled with problems that threatened to produce needless, agonizing pain unless the protocol was significantly modified. Mr. Morales could not have developed such a record without court-ordered discovery and hearings through which he was able to obtain and present reliable evidence about the actual functioning of the California protocol. That evidence revealed, among other

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n.12.) Immediately following the Allen execution, on January 17, 2006, Steven Ornoski, Acting Warden of San Quentin State Prison, stated that the injection team was forced to administer a second dose of potassium chloride to Mr. Allen. Warden Ornoski also revealed at this time that the injection team had used a second dose of potassium chloride in two previous executions. *See* Kevin Fagan, *Reporter's Eyewitness Account of Allen's Execution*, S.F. CHRON., Jan. 17, 2006, at http:// www.sfgate.com/cgi-bin/article.cgi?f=c/a/2006/01/17/MNG37GOHD715.DTL&hw=fagan&sn=003&sc=679.

things, a wide chasm between the painless way in which the protocol was theoretically expected to operate and the torturous way it operated in fact.

The Eighth Amendment issues raised by Mr. Hill's section 1983 complaint cannot and should not be addressed without an adequate factual record. Mr. Hill should be permitted to make such a record.

Respectfully submitted,

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